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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 264 (24,405).

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY, APPELLANTS,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

No. 265 (24,406).

THE HAINES TILE & MANTEL COMPANY, APPELLANT,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN.

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THE JACKSON-WALKER COAL & MATERIAL COMPANY, APPELLANT,

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF ON BEHALF OF APPELLANTS.

The statement of facts on behalf of appellees is incorrect in a number of particulars. The evidence and findings of the referee and the district court establishing that the prop-

"Under all the circumstances of this case, the facts found in the record and stated by the Referee, I am of the opinion the mechanic's lien of the Lumber Company is, and of right should be, prior in equity to the mortgage of the Savings Bank, the mortgage of claimant Conklin and the commission mortgage. More especially is the result reached equitable and just when it is considered neither Conklin, Kimball, nor the Savings Bank, who took liens to secure more than $12,000 on property when taken not worth more than one-fourth of that amount, took no steps to see the proceeds of the first mortgage were applied in satisfaction of the demands of the mechanics and material men who created the improvement to which all the while they expected to look for security, well knowing that if they did not do so and the same remained unpaid, as in this case, by the bankrupt, to realize on their securities they must appropriate to their use the property and labor of others, in such case equity must demand and the statute law of the state does protect the mechanic and laborer in that which he has thus created."

This holding is sustained by the recent case of *White v. Kincade*, 95 Kan. 466, 469, where it is said:

"A vendor of one who induces one who has contracted to purchase it to expend labor and material in improving the land cannot defeat the claims for a lien of those who contribute their labor and material to enhance the value of his property. In such case, in the absence of a controlling agreement, he cannot insist that the mechanic's lien shall be subordinate to his mortgage subsequently given for the unpaid purchase price of the land when the sale is completed and the title transferred."

The rule that a mechanic's lien takes precedence on the enhanced value of the estate made so by the labor and material of the mechanic and the material man, over prior liens existing on the real estate alone before the improvements were placed thereon, finds support in the legislation and decisions of Alabama, Arkansas, California, Colorado, Illinois, Indiana, *Kansas*, Kentucky, Louisiana, Mississippi, Montana, New Jersey, Oregon, Pennsylvania, South Dakota, Texas, and Virginia.

Vol. 20 A. & E. Ency. of L., 2d Ed., 479, and authorities there cited.

It has been so decided, not only in those states where the statute in plain and unequivocal language so provided, but also where by the application of equitable principles the statute could be so interpreted without doing violence to its language. The language of our statute is:

> "Such lien shall be preferred to all other liens or encumbrances which may attach to or upon such land, buildings, or improvements, *or either of them*, subsequent to the commencement of such buildings, etc."

Of course, it is not claimed that such liens can attach to a building or improvement as personal property; but where the building or improvement is placed on the land by one who has an interest in the land, actual or contingent, such interest will support the lien, and the lien will cover the said improvements, as well as said interest.

Thus, it has been held in Kansas, that a lease-hold estate will support a mechanic lien, and the lien thus created will cover a creamery and its machinery and fixtures placed thereon, although the tenant had the right to remove the building, machinery and fixtures at the end of his term.

Hathaway v. Davis, 32 Kan. 693.

The issue in the last cited case was not between the owner or the fee and the mechanic lien claimants, but between the latter and the owner of a chattel mortgage given on the property.

The construction of the statute as contended for by the appellees was announced in *McCrie v. Lumber Co.*, 7 Kans. Ct. of App. 39, where it is said:

> "Under the provisions of Sec. 630 of the Code (Gen. Stat. of Kansas 1889, page 4733), in relation to mechanic liens in cases where there were prior liens upon the land, the mechanics or material men are entitled to priority on the *new structure* erected entirely by them and from their material, independent of the land itself."

On pages 46 and 47 the court says:

"The words 'either of them' are sufficient to indicate that the legislature intended a lien to attach to the buildings independent of the land itself. This construction has been placed by other states upon similar statutes. In some of the states the details by which this separate lien is worked out are more specific in legislative enactment, but such intention is no more clearly expressed. And we conclude that under the provisions of this statute the material men and mechanics had a prior lien upon the building erected by them. It can be worked out either through a finding of the court as to the respective values or separate appraisement of the buildings and land, under the direction of the court, and an award of the amount *pro rata* to each lien holder from the proceeds of the sale *in solido*. While the judgment liens attached to the land prior to the commencement of the building, they did not attach to the building until after the liens of the mechanics attached thereto under the express provisions of the statute."

The evidence in the present proceedings showed that the chief, and practically the only security, that the mortgage claimants had, was on the enhanced value, made so by the labor and the materials that were placed on the lot by the mechanic lien claimants. (Rec. 70, 71, 72.)

Furthermore, there was no evidence that any money represented by any mortgage of the appellants went into the improvements.

The construction of the statute claimed by the appellees, that a mechanic's lien claimant has a prior lien on the enhanced value of the property, made so by his labor or material, regardless of the prior lien upon the land, is in harmony with the spirit of our mechanic's lien legislation and decisions since territorial days. Section 17 of the Act of 1859, provided:

"If the persons who shall have caused the building to be erected has an estate in fee for life, or any less estate, either in law or in equity, or if the land on which the building is erected, at the time of the contract for building or furnishing materials therefor, is mortgaged, or any other lien or encumbrance by contract or

statute, the person who procures the work to be done shall nevertheless be considered the owner to the extent of his right or interest in the land, and the lien hereinbefore provided for by this act shall bind his whole estate or interest therein, and a creditor may cause the right of redemption or whatever other interest or right the owner had in the land, to be sold and applied to the discharge of his debt, according to the provisions of this act."

Under this section, it was held, in *Harsh v. Moran*, 1 Kan. 293, that the mechanic had a lien upon the improvements, erected by a party in possession under an executory contract, but that it was error to sell the land of the fee owner to pay the same.

Sections 14 and 17 of the Act of 1862, were as follows:

"Sec. 14. If the person who procures the work to be done, or material to be furnished, has an estate for life only, or any other estate less than a fee simple, in the land, lot, or lots on which the work is done, or materials furnished, or if such land, lot or lots at the time of making the contract is mortgaged or under any other encumbrance, the person who procures the materials to be furnished or the work to be done, shall nevertheless be considered to be the owner within the meaning of this act to the extent of his right and interest in the premises and the lien herein provided for shall bind his estate and interest therein in like manner as a mortgage would have done, and a creditor may cause the right of redemption, or whatever right or estate such owner had in the land at the time of making the contract, to be sold, and the proceeds of the sale applied according to the provisions of this act.

"Sec. 17. No encumbrance upon the land, lot or lots, created before or after making of a contract under the provisions of this act, shall operate upon the building erected or materials furnished until after the lien in favor of the person doing the work or furnishing the materials shall have been adjusted, and upon questions arising upon previous encumbrances; under the provisions of this act, the previous encumbrances shall be preferred to the extent of the value of the land with-

out such building or appurtenances, and the court shall ascertain by a jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest."

Construing this act, it was held in *Seitz v. U. P. Ry. Co.*, 16 Kan. 134, as follows (2d Par. of the Syllabus):

> "The mechanics lien law of 1862 taken altogether undoubtedly means that a mechanic's lien shall operate upon the whole of the estate which the person procuring the labor and material may have in and to the property for which he procures the same, whatever may be the character of that estate, but such lien cannot operate upon anything more than such estate, and that so far as it does operate, *it is the paramount lien upon the enhanced value given to such estate by the labor and materials. That is, it is the paramount lien upon the surplus value of the estate over and above what would have been the value of such estate without such labor and materials.*"

In *Getto v. Friend*, 46 Kan. 24-30, construing the present statute, it was held that the order of priority should be: As to the *legal estate:* First, the mortgage to Melrose (identical with the $7,500 mortgage to Kimball); Second, the mortgage to Rogers (identical with the $700 mortgage to Rowe); Third, the mortgage to Getto (identical with the $4,500 mortgage to Conklin); Fourth, the mechanics' liens. And upon the *equitable estate* of Peavey: First, the mechanics' liens; Second, the mortgages following them in the order above stated.

If it be true that "on that date (January 3, 1911), Conklin conveyed this property by deed to Charles Bron," then the legal as well as the equitable estate was in Bron when the work was progressing on the morning of January 4th, prior to the execution of the mortgages, and the liens should have been established as in the order last named in *Getto v. Friend.*

It will be noted that Getto's mortgage was a purchase money mortgage, and the *District Court* gave it priority over all liens on the property, but subrogated the Melrose mortgage as a first lien to the extent of the amount due on

the Getto mortgage, because of the agreement that the Melrose mortgage should be a first lien. This was held erroneous, and Getto's mortgage was assigned its true place the same as if the consideration had been other than for the purchase price.

From these decisions of the Supreme Court of the state of Kansas interpreting the statute it is apparent that the mechanic lien holders are entitled to a first lien on the enhanced value of the premises without regard to the question of the priority of the mortgages.

V.

UNDER THE KANSAS STATUTE OF FRAUDS THE ORAL AGREEMENT THAT THE MORTGAGES SHOULD BE EXECUTED AND DELIVERED CONCURRENTLY WITH THE EXECUTION AND DELIVERY OF THE DEED TO THE BANKRUPT AND BE A FIRST AND PRIOR LIEN UPON THE PROPERTY, AND THAT THE KIMBALL MORTGAGE SHOULD BE PRIOR TO THAT OF CONKLIN, WAS VOID AS TO THE APPELLANT MECHANIC LIEN HOLDERS.

As we have pointed out (p. 9 of this brief) the statement of the Court of Appeals that the title to the property did not pass to Bron until 11:40 A. M. January 4th is erroneous. Both the District Court and the Referee found that the property was sold and conveyed to Bron on January 3rd. At that time in any event he was entitled to the possession of the property. The Court of Appeals found that there was a verbal agreement between Kimball, Conklin and Bron that the "mortgages should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt and be a first and prior lien upon the property, the Kimball mortgage to be prior to that of Conklin." Under the Kansas Statute of Frauds relating to interests in real estate this oral agreement is absolutely void. Sections 3837 and 3838 of the General Statutes of Kansas, 1909, read as follows:

> "3837. *Leases.*—5. *No* leases, *estates or interests of, in or out of lands*, exceeding one year in duration, *shall at any time hereafter be* assigned or *granted, unless it be by deed or note, in writing*, signed by the

executed at the time of the delivery of the deed. *But aside from this the record fails to show the existence of either of such oral agreements.*

If the Conklin mortgage has priority over the mechanics' liens because it was a purchase money mortgage executed and delivered at the same time as the deed, yet that does not make the Kimball mortgage prior to the mechanics' liens because of the agreement between Kimball and Conklin as to the rank of their mortgages. Conklin could not make a purchase money mortgage of the Kimball mortgage by agreement. If his mortgage is prior to the mechanics' liens, then the priority would be determined under the rule laid down in Malmren *vs.* Phinney, 50 Minn., 457; 52 N. W., 915; 18 L. R. A., 753, which has been followed in other States. (See 3 L. R. A., Extra Annotations, p. 466.) The assignee of the Kimball mortgage would have the first lien to the amount of the Conklin mortgage. The mechanics' liens would be second. The assignees of the Kimball mortgage would be third for the remainder of their mortgage. The Conklin mortgage would be fourth.

Appellants contend that they have priority over both mortgages, and that because the Conklin mortgage was a purchase money mortgage makes no difference, but if it does the judgment of the Circuit Court of Appeals was erroneous in finding that both the Conklin and Kimball mortgages were prior to the mechanics' liens.

The Right of Mechanics' Lien Claimants to Lien upon the Improvements.

The appellants claim that they are entitled to a first lien on the enhanced value of the property created by their improvements. Appellees admit that if the bankrupt Bron had any equitable estate at the time the building was commenced, appellants are entitled to a lien thereon. Appellees say (bottom page 10 of their brief):

"Under circumstances similar to these in this case, that is, where work is commenced without a legal title, the courts have sometimes held that a lien can attach to the equitable title of the one making improvements."

The bankrupt had entered into an agreement on December 22 for the purchase of the property. This is undisputed. Conklin knew the bankrupt was going to erect a building thereon. The bankrupt was not forbidden to enter upon the land. There is absolutely no evidence to that effect. By virtue of the contract he had entered into, he had an interest in the land—an equitable estate. To that equitable estate bankrupt added by virtue of appellants' materials an enhanced value of $13,000.

To this enhanced value the liens of the materialmen attached. The bankrupt was not a mere volunteer.

A case in point is Meyer Bros. Drug Co. *vs.* Brown, 46 Kans., 543. The agreed statement of facts on which that case was submitted to the Supreme Court of Kansas is as follows:

"S. A. Brown & Co. entered into a contract with D. A. Wilson, defendant, in December, 1886, to furnish lumber and materials to erect a building on lots 1, 2, and 3, block 7, Yates's 4th addition to the city of Yates Center, Kans. At the date of said contract G. H. Phillips held the legal title to said lots, which were at that time unimproved; but there was an agreement between said Phillips and D. A. Wilson by which said Phillips was to convey said lots to said D. A. Wilson; that on January 1, 1887, G. H. Phillips and wife conveyed said lots to said D. A. Wilson by warranty deed, and that on January 6, 1887, said D. A. Wilson and wife executed and delivered to Scott & Brier, defendants herein, a mortgage on said lots to secure the payment of $550, for the purpose of obtaining money to pay for the lumber and materials to erect a dwelling on said lots; that S. A. Brown & Co. had, prior to January 1, furnished a portion of said lumber, and work had commenced

old and the separation of the new from the old part would leave the old uninhabitable and would amount to an injury to the freehold, the removal was not permitted. In the instant case, the whole new building belonged to the bankrupt and could be removed without injury to the freehold, but here the equitable estate was perfected into a legal estate. So here, under the appellees' own contention, all they are entitled to is a lien of the purchase-price mortgage of $4,500 on the premises.

Appellees complain, on page 33 of their brief, that no method is provided by statute for the sale, valuation, or appraisement and distribution of a fund arising from the value of the land and the value of the improvements. There is no more difficulty in separating the enhanced value added to the property by the improvements than selling the equitable estate separate and apart from the legal estate. The same method of separation can be applied in one case as in the other.

The Supreme Court of Kansas, under the mechanics' lien laws, has repeatedly, as we have shown, recognized the right of mechanics' liens to attach to the equitable estate separate from the value of the legal estate. It therefore follows that in any view of the case appellants are entitled to a lien on the equitable estate, which in this case is the enhanced value which the improvements gave to the property. Such an interpretation is in accordance with the broad interpretation given to the statute by the Supreme Court of Kansas in order to effect the purpose of its enactment, viz., to protect materialmen and laborers who by looking at the building and the record ascertain that the work of erecting the building was commenced before any mortgages or other liens were filed of record.

The Circuit Court of Appeals held that the work done on January 3 and 4 did not amount to a commencement of the building under the Kansas law.

The case of Thomas *vs.* Mowers, 27 Kas., 265, is decisive of this point. It cites Pennock *vs.* Hoover, 5 Rawle, 290 (*l. c.*), 307, where it is held that it is the first labor done on the ground which is made the foundation of the building, which constitutes the commencement of the building. The case of Pennock *vs.* Hoover is followed in Parrish and Hazard's Appeal, 83 Penn. State, 111, the court holding that the building was commenced the day before the mortgage was filed for record, and thus the mechanics' lien had priority over the mortgage.

CONCLUSION.

Upon conflicting evidence the referee and the district court have found that the property was conveyed to the bankrupt on January 3 and that the work of commencing the building was also begun on January 3. The Circuit Court of Appeals did not refuse to accept the findings of the referee as to the date of the commencement of the building and the conveyance of the property to the bankrupt because it was apparent that a mistake had been made or that there was no evidence to support his findings, but ignored these findings and made its own findings on conflicting testimony. This procedure was not in accordance with the rule announced by this court.

The referee did not find that the bankrupt fraudulently entered upon the premises or entered upon the land before he had a right to do so, but based his decision solely and entirely upon an alleged oral agreement between the bankrupt and Conklin that no work was to be done until Conklin's mortgage was recorded, and stated that the work on January 3 was fraudulently done for the purpose of preferring mechanics' liens over the mortgages. There is no evidence in this case and appellees have been unable to quote any showing that there was any agreement whatever with Kimball (the assignor of the New Hampshire Savings

Bank) in regard to not commencing work before the filing of Kimball's mortgage, but if there was such an oral agreement it would be void, as it was unexecuted until after the rights of the mechanics' lien holders had attached. Therefore the statute of frauds of the State of Kansas would apply to it.

The appellees have studiously avoided reference to the large amount of work which was done on the morning of January 4 after the time appellees admit the deed was delivered to the bankrupt and before the mortgage of Kimball was recorded.

Appellees have attempted to show that this case depends upon a question of fact. It does not. It depends upon a question of law. The referee and district court found that the work was commenced on January 3 and the property was conveyed to the bankrupt on the same day. The stipulation of the parties shows the mortgages were not executed and recorded until January 4. With this state of facts the referee, in order to prefer the mortgagees, stated that the work on January 3 done by the bankrupt was fraudulently done. The district court decided that the motive with which the work was done was immaterial as the mechanics' lien holders had no knowledge of such intent and were not bound by the motive of the bankrupt. The Circuit Court of Appeals took the view of the referee. It is now for this court to say whether materialmen of the States of Kansas and Oklahoma (where the same mechanics' lien law prevails) are to hazard their protection under the mechanics' lien law on the state of mind of the owner when he commences work. This is a question of the utmost importance to the many companies furnishing material in the States of Kansas and Oklahoma. The Circuit Court of Appeals has injected into the Kansas statute an uncertainty which has never before existed. It is for this court to say whether the interpretation of the Circuit Court of Appeals or of the Supreme Court of Kansas shall prevail. We submit that the broad

beneficial terms of the mechanics' lien law shall not be curtailed. We insist that the rights of materialmen shall not be jeopardized by the unknown and unascertainable intent of the owner when he commences the building. With the district court we say that all that is necessary for a mechanics' lien man to investigate before furnishing material is to look at the ground, see that the building has been commenced, investigate the record and ascertain that no mortgages or other liens had been filed of record before the building was commenced.

We therefore ask this court to sustain the finding of the district court, reverse the decree of the Circuit Court of Appeals and direct that the mechanics' liens shall be a first lien upon the property because the building was commenced before the mortgages were recorded and the rights of the mortgagees attached.

Respectfully submitted,

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erty was conveyed on the 3d of January are found in our original brief, commencing on page 9, and we will not stop now to review that testimony.

However, we take exception to that part of the statement of facts found in the second paragraph, on page 2, of appellees' brief as follows:

> "The mortgages were to be executed at the time of the delivery of the deed and before any work was commenced on the building or material furnished; nothing was to be done until the deed and mortgages were recorded. (Referee's Certificate, Transcript, page 10.) (Transcript, pages 48 and 78.)"

There is absolutely nothing in the certificate of the referee which supports any such statement, and the evidence found on pages 48 and 78 of the transcript is set out in appellees' brief at pages 9 and 10. We shall take this matter up later and prove that the foregoing extract has no support either in the findings of the referee or any evidence in the record.

The statements found on page 4 of appellees' brief to the effect that the closing of all transactions took place on the forenoon of January 4, 1913, and that Bron fraudulently entered upon the property and did work on January 3 prior to a time when he had a right to enter upon the lands is contrary to the finding of the referee and the district court, as we have pointed out in our original brief commencing on page 9.

On pages 6 and 7 of their brief appellees contend that inasmuch as the referee and the district court found the title to the property was conveyed on January 3, and that on the same date the deed and the mortgages were recorded, the referee must have meant that all the acts took place on January 4, because on that date by stipulation of the parties it was agreed that the deed and mortgages were recorded. However, on page 8, appellees admit there was a direct conflict of the testimony between Bron and Conklin as to when the deed was delivered. Bron insisted that it was on Jan-

uary 3, and Conklin declared that he did not remember of the deed (which was duly executed and acknowledged on the 3d) being out of his possession on the 3d or turning it over to Bron on that day (Trans., 81, 82). The referee and the district court, as we have pointed out, found that the deed was delivered on January 3. Under the rule of this court this finding of fact on conflicting evidence must stand, and this court will accept January 3 as the date of conveyance. Inasmuch as the express stipulation of the parties shows the mortgages were not recorded until the 4th, the finding of the referee, being wholly unsupported by the evidence, must be set aside in this respect. There is nothing inconsistent in the attitude of the appellants in this respect. The finding of the referee approved by the district court must be accepted, except where it is clearly shown that the finding is totally unsupported by the evidence. We have a right therefore to show the stipulation in respect to the date of the recording of the mortgages. Appellees admit that there was a conflict as to the date of delivery; therefore the date found by the referee and approved by the district court, to wit, January 3, must be sustained.

There was no dispute before the referee as to the date of the execution and recording of the mortgages. This was stipulated. No evidence was introduced on the subject. There was, however, a very spirited dispute as to the date of the delivery of the deed and conveyance to the bankrupt and as to when the work of commencing the building was done. Evidence was presented to the referee at length on these points. On the one hand the appellants contended that the work was commenced on the 3d and the deed was delivered on the 3d. The appellees contended there was no work done on the 3d and no conveyance made on that date. Thus the 3d was impressed upon the referee's mind as the date of the conveyance of the property and the commencement of the work. He found that the conveyance to the bankrupt was made on the 3d, and also that the work was commenced on that date. The referee evidently recognized that there

The cases cited by appellees on pages 11, 12, and 13 we have discussed in our original brief.

We wish to correct a statement of appellees at the bottom of page 14 of their brief "that the contract under the mechanics' lien law must be made with the owner, who, until January 4, was Conklin, not Bron." As we have already established, the property was conveyed to Bron on January 3. It is not the recording of the deed which controls. The mechanics' lien attaches to whatever interest the contracting party has in the land at the time the work is commenced. Unlike the mortgage it is immaterial whether the deed was of record. This is established by the case of Lang *vs.* Adams, 71 Kan., 311, quoted from at page 32 of appellees' brief. There it was said that the owner of record does not control, but the *actual* owner of the interest in the property. Appellees admit, on page 10, that the lien might attach to the equitable title of one making the improvements. Bron had the legal title as well as the equitable title on January 3. The fact that the record did not show he was owner is immaterial, but the mortgages had no rights superior to the mechanics' liens under the Kansas recording act until they were placed of record (Jackson *vs.* Reid, 30 Kans., 10).

In this connection we wish to quote correctly the act set out on page 32 of appellees' brief:

> "No such instrument in writing shall be valid except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record" (section 1672, General Statutes of Kansas, 1909).

He got the equitable title on December 22, 1910, when Conklin, the agent of the owner, admits the agreement was made for the lots (Trans., p. 78). This would have supported a lien on the equitable estate under the Kansas law, even though a deed had not been made to Bron.

Appellees contend that a mechanics' lien holder is not an *innocent purchaser for value* under this act. He does *not*

have to be because the act specifically provides that the unrecorded mortgages *shall not be valid* except as between the parties thereto and parties having actual notice thereof. There is nothing in the statute about being an innocent purchaser for value. In support of their contention appellees cite cases from Wisconsin and Iowa. By reference to the text of the cases cited it will be seen that the Iowa statute reads:

> "No instrument affecting real estate is of any validity against SUBSEQUENT *purchasers for a valuable consideration*, without notice, unless recorded in the office of the recorder in the county in which the land lies, as hereinafter provided."

The statute of Wisconsin is set out in the case of Mathwig *vs.* Mann, 65 Am. St. Rep., 47 (Wis.), (cited by appellees in support of their contention) in these words:

> "The only effect of such failure of Mann to record his mortgages for three days after they were executed and delivered to him was the liability of having the same become 'void as against any *subsequent purchaser in good faith, and for a valuable consideration*, of the same real estate or any portion thereof, whose conveyance should first be duly recorded.' (Rev. Stats., sec. 2241.)"

It is thus seen that the cases cited under such statutes have no application to the Kansas law, which is totally different and makes the instrument void unless recorded regardless of whether or not the third parties are innocent purchasers for value. The mortgages until recorded were void against parties, such as the mechanics' lien holders, who advanced value to the bankrupt in reliance on the record at the time the building was commenced.

The case of Mortgage Company *vs.* Winter, 94 Kans., 615, quoted from by appellees in their brief on page 17 and again cited on page 30 is not in point. The second syllabus (written by the court as the law of the case) reads:

> "A mortgage given at the time of the purchase of the mortgaged land by the mortgagor, to obtain the money used by him to pay the price, and thereby procure the deed, has priority over a deed made by the mortgagor at a time when he had no title, to a *grantee who knew of the negotiations for the mortgage and had agreed to take the property subject to it* although the only reference to the mortgage in the deed is in an exception to the warranty of title."

A very different rule applies where the party claiming the lien agreed that the mortgage might be prior to his interest than that which applies where the lien claimant had no knowledge of the mortgage until after his own lien attached. The case of Russell *vs.* Grant, 43 Am. St. Rep., 563 (page 16, Appellees' Brief), and the cases cited in connection with it have to do with purchase money mortgages, as do the cases cited under the heading "Purchase Money Mortgage," extending from page 17 of appellees' brief to page 25, inclusive. The same is to be said of the cases cited at the top of page 29 of appellees' brief. These decisions have no bearing on the question of the Kimball mortgage of $7,500, as it was not a purchase-price money mortgage.

We insist that this case is to be decided on the Kansas statutes as interpreted by the Supreme Court of Kansas and not by the decisions of other States based upon entirely different statutes. Decisions from other States are not controlling and are of but little value, owing to the diversity of the recording acts and mechanics' lien laws. The mechanics' lien act is to be liberally construed in order to protect materialmen and laborers. This is the pronouncement of the Supreme Court of Kansas in Wallpaper Company *vs.* Perkins, 90 Kans., 727, where it is said:

> "It may be premised that the mechanics' lien law of this State is not, like similar laws in some other States, construed strictly because in supposed derogation of the common law. The law is framed on broad principles of justice and equity which would call for a liberal interpretation in the absence of a statutory

rule governing the matter. (Deatherage *vs.* Henderson, 43 Kans., 684, 690; 23 Pac., 1059; Lumber Co. *vs.* McCurley, 84 Kans., 751; 115 Pac., 590; Lumber Co. *vs.* Douglas, 89 Kans., 308, 316; 131 Pac., 563.) But besides this, the legislature has prescribed a rule which reads as follows:

"'The rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this State, but all such statutes shall be liberally construed to promote their object.' (Gen. Stat., 1909, #9850)."

The New Hampshire Savings Bank Mortgage.

The $7,500 mortgage of the New Hampshire Savings Bank which was originally given to Kimball is admittedly not a purchase-price mortgage. Whatever right the New Hampshire Savings Bank can claim arises from one of two things:

First. That there was an oral contract with the bankrupt Bron that it was to be recorded at the same time that the deed was executed and delivered, or,

Second. That there was an oral agreement between bankrupt Bron and Kimball that no work was to be done on the premises until the $7,500 mortgage was recorded.

The Kimball mortgage must stand on one or the other of these propositions. It cannot be based on the fact that it was a purchase-price money mortgage, because it was not. It cannot be contended that the delivery of the deed and the giving back of the mortgage were one and the same transaction so far as the Kimball mortgage was concerned, because Kimball had nothing to do with the giving of the deed. Such is treated as one transaction, if at all, only when a deed is given and a purchase-price money mortgage is taken. Not one cent of the Kimball mortgage of $7,500 went to pay for the land. If the fact that the Kimball mort-

gage was recorded ten minutes before the Conklin mortgage made the Kimball mortgage superior to the Conklin mortgage, then the fact that the deed to Bron was, according to appellees' contention, delivered at 11 and recorded at 11:40 a. m. (more than thirty minutes before the Kimball mortgage was recorded), shows that for thirty minutes Bron had an unencumbered title, so far as the Kimball mortgage was concerned, and during that thirty minutes work was being done on the premises. Not only had the building been commenced on January 3, but work of a very substantial nature was being done toward the erection of the building all the morning of January 4. (See our Original Brief, pages 3, 12.) Appellees have totally ignored the work done toward the excavation for the foundation on the morning of January 4. It is therefore apparent that by reason of the commencement of the building on January 3 and the work done on the morning of January 4 the rights of the lien holders attached, even under the state of facts contended for by the appellees, at the time of the delivery of the deed to Bron at 11 o'clock and prior to the recording of the Kimball mortgage of $7,500 at 12 p. m. So the Kimball mortgage, not being a purchase-price mortgage, must depend for its priority, if at all, upon some agreement that the bankrupt had with Kimball, which agreement could not affect the rights of the mechanics' lien holders.

Now, the record in this case does not disclose any agreement between Kimball and the bankrupt Bron as to the commencing of the work or the delivery of the deed and recording of the mortgage. There is absolutely no evidence in the record as to either sort of an agreement between Kimball and Bron. Appellees have failed to show any such evidence, but even had there been such an oral agreement with Kimball it was void as to the mechanics' lien holders under the statute of frauds of Kansas. (See our Original Brief, page 29.)

Appellees, on page 36 of their brief, attempt to avoid the effect of the statute of frauds of Kansas by saying that it

does not apply to an executed contract, but these oral agreements, if any, were not executed contracts at the time the mechanics' lien holders' rights attached. At the time of the delivery of Conklin's deed to Bron, Kimball had done nothing to perform his side of the contract. He had not paid the money to the bankrupt Bron, and it was only the execution of the contract by Kimball which would have prevented the statute of frauds from applying. We wish to call attention to a very recent case by the Supreme Court of Kansas in point. In Banister *vs.* Fallis, 85 Kansas, 320, a written contract had been made for the exchange of land, each party to furnish an abstract showing a perfect title to his land. The parties met at the bank to close the deal when a supposed defect in the title to the Fallis land was discovered. An oral agreement was made that all papers should be left in the bank until the supposed defect in the title was cured. Fallis orally agreed to obtain a quit claim deed curing the alleged defect. The deeds were recorded by some one other than the plaintiff Banister, who brought suit to cancel the deeds on the ground that Fallis had not complied with the contract. The Supreme Court of Kansas decided:

> "An oral agreement between a vendor and a vendee of land which arrests consummation of the written contract between them until the vendor procures a deed to cure a supposed defect in his title, which deed the vendor promised to obtain, is unenforceable under the statute of frauds."

So here the alleged oral agreements, if any were made, were void and unenforceable. It is upon the enforcement of such oral agreements that the priority of the Kimball mortgage must rest. Unless the assignee of the Kimball mortgage can enforce the purported oral agreement, that mortgage is subsequent to the mechanics' liens which attached, at the latest, immediately upon the delivery of the deed. As to the Kimball mortgage, the oral agreements were not

IN THE

Supreme Court of the United States

_____TERM, 1916.

No. 264.

G. F. VARNER AND W. E. MARSHALL, PARTNERS, DOING BUSINESS AS THE WICHITA LUMBER COMPANY,
Appellants,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN,
Appellees.

No. 265.

THE HAINES TILE & MANTLE COMPANY,
Appellant,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN,
Appellees.

No. 266.

THE JACKSON-WALKER COAL & MATERIAL COMPANY,
Appellant,

vs.

THE NEW HAMPSHIRE SAVINGS BANK AND P. J. CONKLIN,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF FACTS ON BEHALF OF APPELLEES.

THE statement of facts by the appellants is incorrect as to the date the deed was delivered to Bron. The Referee's finding shows that January 3rd was an error, from the balance of the findings, and that January 4th was the date intended. The facts, stipulations and findings appear in the transcript and will be referred to in the brief.

The findings of the Referee show that the deed and mortgages were delivered at the same time (Transcript, page 9), and all recorded by E. D. Kimball. (Transcript, pages 97 and 78, *reference to Sargent.*)

Pursuant to certain oral negotiations, about December 20th, 1910, Bron and Conklin negotiated regarding a sale, and it was orally agreed as follows: That the property was to be sold to Bron, a $4500.00 purchase money mortgage was to be taken back, to be subject to a $7500.00 mortgage thereafter to be executed, on which Bron was to borrow funds with which to build a building on the lots. The mortgages were to be executed at the time of the delivery of the deed and before any work was commenced on the building or material furnished; nothing was to be done until the deed and mortgages were recorded. (Referee's certificate, Transcript, page 10.) (Transcript, pages 48 and 78.)

The Referee established the mortgage liens of the appellees as a first lien.

The United States District Court reversed the order of the Referee and established the liens of the mechanic's lien holders over the mortgages of the appellees herein.

A.

The finding of the Referee as to the facts, that prior to the execution of the deed and mortgages Conklin was the owner of and occupied as a homestead the property in question, the subject matter of this controversy. (Transcript, page 9.)

B.

On January 4th, 1911, Conklin conveyed this property by deed to Bron, the bankrupt, and received in payment a mortgage for $4500.00, which it was agreed between Bron and Conklin should be a second lien to the mortgage of $7500.00, which was to be, and was, on that date executed by the bankrupt to E. D. Kimball.

C.

This $7500.00 mortgage was afterwards endorsed and assigned to the appellee, The New Hampshire Savings Bank.

D.

The deed to Bron and both mortgages were filed for record on January 4th, 1911.

E.

At an early hour on January 3rd, 1911, the bankrupt entered upon the premises with laborers and did an hour or two's work toward the excavation of the foundation for the building to be erected on the land. Subsequently, various parties furnished labor and material in and about the erection of improvements, for which they filed mechanic's liens.

F.

The property was ordered sold, free from liens, and the liens transferred to the funds to arise from the sale of the property.

G.

The deed to Bron was delivered to Kimball by Conklin and filed for record by Kimball, and all said instruments were filed at the same time that any work was done prior to January 4th, 1911, the instruments all being filed at noon of said date. (Transcript, pages 12 and 13.)

H.

There was a stipulation in the case (Transcript, page 12) between the parties, by which stipulation it was admitted that Laura Conklin received a deed for this property on March 22nd, 1897, filed for record on April 4th, 1902; and that Laura Conklin and husband signed a deed, dated December 31st, 1910, for a consideration of $4500.00, which deed was signed and acknowledged on January 3rd, 1911, and which was filed for record January 4th, 1911, at 11:40 o'clock A. M. of said day, which transferred the property from Laura Conklin and husband to the bankrupt, Bron.

2. By the stipulation it was also agreed that Charles Bron and wife executed to E. D. Kimball a mortgage for $7500.00, dated January 3rd, 1911, acknowledged January 4th, 1911, and filed for record January 4th, 1911, at 12:10 o'clock P. M., covering the same property mentioned in the deed to Bron.

3. It was also stipulated that the bankrupt and his wife executed to P. J. Conklin a mortgage for $4500.00, which appears to be dated December 31st, 1910, acknowledged January 4th, 1911, and filed for record January 4th, 1911, at 12:30 o'clock P. M. The said mortgage of $4500.00

from the bankrupt Bron to Conklin excepts a mortgage of $7500.00, dated January 3rd, 1911, executed to E. D. Kimball, and being the mortgage now owned by the appellee, The New Hampshire Savings Bank.

The facts are that Conklin owned the property; that Bron negotiated for the purchase; that Bron obtained a $7500.00 mortgage on the property from Kimball; that Conklin was to have a $4500.00 mortgage, which was to be inferior to the mortgage of $7500.00. The final closing of all transactions was in the forenoon of January 4th, 1911.

The Referee found (Transcript, page 10) that at an early hour on January 3rd, 1911, Bron fraudulently entered on the premises and did an hour or two's work. This was prior to the time that the bankrupt received his deed and prior to the time the mortgages had been delivered, and prior to Bron's right to enter upon the land.

The District Court (Transcript, pages 125 and 128) adopted the findings of the Referee as to the facts, but disagreed with the Referee as to the conclusions that follow from the facts.

The District Court adopted the findings of the Referee (Transcript, page 126) that the conveyance of the property from Conklin to Bron, and the mortgages to Conklin and Kimball, were all executed and delivered and filed for record at the same time.

ARGUMENT.

Before replying to the brief of the appellants in this case, the appellees state their claim that The New Hampshire Savings Bank is entitled to a first lien, and P. J. Conklin is entitled to a second lien, on the proceeds in the hands of the Trustee.

SECOND.

A purchase money mortgage is prior to any right of anyone who claims by or through Bron, where all the instruments are delivered at the same time.

THIRD.

Any work done by Bron prior to the time that he obtained the deed, or was entitled to his deed, cannot prejudice the rights of the appellees.

FOURTH.

The deed to Bron was delivered to Kimball by Conklin, filed for record, and all instruments were filed at the same time, and all work done prior to January 4th, 1911, at noon, was done before Bron had any right or title or any right of possession of the land.

FIFTH.

Anyone who claims a right superior to Conklin and The New Hampshire Savings Bank must not only show that Bron had a deed, but had a lawful right to commence work, with the knowledge and consent of Conklin and Kimball.

SIXTH.

The deed and mortgages, being all filed for record at the same time, prove that this is one transaction.

SEVENTH.

A mechanic's lien claimant is not a *bona fide* purchaser, protected by the recording acts of Kansas.

EIGHTH.

The rights of all the parties hereto hinge on the question as to the date of the delivery of the deed and the mortgages and the contracts of the parties under the agreements made.

NINTH.

A purchase money mortgage cannot be displaced by any act of the vendee, or anyone claiming under him.

FIRST.

THE PROPERTY IN CONTROVERSY WAS CONVEYED TO THE BANKRUPT ON JANUARY 3, 1911, AND THE WORK OF EXCAVATING FOR THE FOUNDATION WAS BEGUN ON JANUARY 3, 1911, AND CONTINUED ON THE MORN- OF JANUARY 4, 1911.

APPELLEE'S CONTENTION:

The property in controversy was conveyed to the bankrupt on January 4, 1911. Any excavation for foundation on January 3, was prior to the time that bankrupt had any right, title or interest in the premises, and if mechanic's liens could attach they could attach only to such title as the bankrupt was to have under the contract of sale.

The Referee's certificate shows that the deed and mortgages were all executed and delivered as conveyances of title on the same date. He states this date to be January 3rd, 1911. His findings is as follows:

> "Prior to January 3rd, 1911, the creditor Conklin was the owner of, and occupied as his homestead, the following-described property:" . . .
>
> "On that date Conklin conveyed this property by deed to Charles Bron, the bankrupt, in payment for which he received a mortgage from Bron for $4500.00, which, it was agreed between the parties, should be a second lien to a mortgage of $7500.00 *which was to be and was executed on that day* by Bron to E. D. Kimball, and which was afterwards assigned to The New Hampshire Savings Bank and by it presented in this estate. The deed and both these mortgages were duly recorded on the 3rd day of January, 1911." (Transcript, 9.)

The District Court after a review of this matter in its memoranda of opinion approves this finding, and states:

> "That the conveyance of the property from Conklin to bankrupt, and the mortgages made by the bankrupt, were all executed and filed for record on the same day." (Transcript, 126.)

The appellants accept these findings as to the date January 3rd, but discredit that part of the findings which states that the transaction occurred on the same date. They do this by referring to the stipulation of parties in the trial of the matter, which shows that it was January 4th instead of January 3rd when the instruments were recorded. It is evident that the Referee and the District Court erred in the date, but it is also evident that the ultimate fact which they intended to find was that the deed and mortgages were delivered on the same day, whatever that date was, and not that the date necessarily was January 3rd in place of January 4th. The date is only of significance in this matter in determining when these acts occurred, that is, to show that the delivery of the deed and the execution of the mortgages were on different days, to wit: January 3rd and January 4th. The Referee and the District Court in their findings settled the fact that it was on the same day, be that January 3rd or January 4th.

The appellants realize that to make any feasible contention in this matter it is necessary to create an interim between the delivery of the deed and the delivery and execution of the mortgages. This interim is the basis for the contention that the building was commenced by the surreptitious excavation upon the foundation while the bankrupt had title through the deed and before the mortgages were executed.

To create this interim they accept the findings of the Referee and of the District Court as to the date of January 3rd, arguing that the finding of the lower court should always be accepted, but in the same breath request that the findings of the Referee and District Court should be discredited because by stipulation of parties the date of the execution and recording of the mortgages is fixed at January 4th. In this connection it should be noted that the Referee, in the second paragraph of the finding quoted, specifically found that the agreement of Bron and Conklin